

## **REMARKS**

### **I. Introduction**

Claims 1, 4, 8, 10 and 13 are presently pending and finally rejected. Following entry of the present amendment, claims 4, 8 and 10 are amended. It is believed no new matter has been added.

Applicants thank the Examiner for accepting the amendment to the specification.

Applicants note item #9 on form PTOL-326 is marked, but believe this to be an error, and request clarification if Applicants understanding is incorrect.

Claims 4, 8 and 10 are objected to for recitation of the phrase "characterized in that".

Applicants have amended claims 4, 8 and 10, and request the objection be withdrawn.

### **II. 35 USC § 103 rejections**

A. Claims 1, 4, and 10 are rejected under 35 USC 103(a) as being unpatentable over Duffett (WO 98/13133) in view of Itagaki et al. (EP 0564787).

The Examiner finds Duffett teaches powdered form of cocoa butter, which is a vegetable fat with at least 99% weight cocoa butter, and is thus a non-gelling gelatin substitution product. However, Duffett is silent as to cocoa butter being deodorized. The Examiner finds Itagaki et al. teaches confectionery fat composition including deodorized cocoa butter, and deodorized cocoa butter was known and available at the time of the invention. The Examiner finds the deodorized cocoa butter of Itagaki does not have a strong flavor, and thus can be advantageously incorporated in food products of various flavors. Thus, according to the Examiner it would have been obvious to one of ordinary skill in the art to modify Duffett and use deodorized cocoa butter to make the powdered form, motivated by the desire of removing undesirable cocoa butter flavor and making the fat based powdered product more versatile and usable in foods with other flavors such as vanilla and fruit flavors as taught by Itagaki. Regarding claim 3, the Examiner finds Duffett teaches that a fat composition may also comprise color, flavor and/or vitamins, and it is noted oil soluble vitamins include vitamins A and E, which are antioxidants. Regarding claim 10, the Examiner finds Duffett teaches of chocolate, cereals, ice cream, chocolate drinks, chilled products etc may be made by incorporating the cocoa butter powder. The Examiner finds the moisture content of a given food can be obtained by subtracting the total solids weight from the

total food weight. Since Duffett teaches incorporation of cocoa butter containing product in very low moisture content cereals to high moisture content ice creams and drinks, it would have been obvious to use Duffett's cocoa butter product in culinary preparations with moisture content of 40 – 50%.

Applicants respectfully submit that a *prima facie* case of obviousness has not been established over the claims as presently amended, and request the rejection be withdrawn. The obviousness determination requires four kinds of factual inquiries:

- (1) the scope and contents of the prior art;
- (2) the differences between the prior art and the claims at issue;
- (3) the level of ordinary skill in the pertinent art; and
- (4) any objective indicia of success such as commercial success, long felt need, and copying.

*KSR Int'l. Co.*, 127 S. Ct. at 1735 (citing *Graham v. John Deere Co.*, 383 US 1, 17-18 (1966)).

1. The scope and content of the Prior Art and Differences Between the Prior Art and Claimed Invention:

The present invention is directed to a non-gelling gelatin substitute product. The composition is essentially vegetable fat of at least 99 weight % cocoa butter deodorized to an extent of 90-95%, and is in the form of a powder.

Duffett discloses a method for producing crystals of fat. A substance (solid at room temperature) is obtained in liquid form. The liquid is atomized, and the atomized liquid is rapidly cooled so that at least partially solid particles are formed. One aspect of Duffett is a method of making chocolate. Cocoa butter or cocoa mass is obtained in liquid form, atomized, and the atomized liquid is rapidly cooled to form a powder, which is added during the chocolate making process as part of the crumb making process or at the conching/tempering stage of chocolate production. Pages 12 – 13. Duffett does not teach or suggest any vegetable fat composition having at least 99% weight cocoa butter.

Itagaki et al. discloses confectionary fat compositions comprising from 20 to 80% by weight of a deodorized cocoa butter and from 20 to 80% by weight of hardened fats. Such compositions are suitable for sandwiching or filling in biscuits, cakes and bread, which is excellent in flavor, melting properties, texture, shape retention at ordinary temperature and

whipping properties, has a sharp meltability in the mouth. Itagaki emphasizes the unsuitability of cocoa butter alone for these purposes, and the compositions disclosed additionally require the presence of 20 - 80% hardened fat with a melting point of 45°C or lower.

2. The Obviousness Determination:

*Itagaki and Duffett fail to teach or suggest all of the limitations of the claims.*

As previously stated, the present invention is directed to compositions which contain essentially a vegetable fat of at least 99 weight % cocoa butter deodorized 90 - 95%, and is in the form of a powder. Neither reference teach or suggest any composition having at least 99 weight % cocoa butter, or any composition having cocoa butter which has been 90 - 95% deodorized.

*There is no reasonable expectation of success or motivation in practicing the claimed invention based on the disclosure of Itagaki et al. and Duffett.*

A prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention. *W.L. Gore & Assoc. Inc. v. Garlock, Inc.*, 721 F.2d 1540 (Fed. Cir 1983).

The Examiner finds deodorized cocoa butter as taught by Itagaki et al does not have a strong flavor, and thus can be advantageously incorporated into food products of various flavors. However, Itagaki et al. discloses cocoa butter needs to be tempered, but fat compositions which are tempered can hardly be whipped because of the fat crystal content. Page 2, lines 11 - 19. Accordingly, Itagaki solves this problem by incorporating 20 to 80% by weight of a hardened fat into the compositions. Based on a fair reading of Itagaki, one of skill in the art would not be motivated to produce a composition having 99% cocoa butter, as such compositions are clearly unsuitable for uses contemplated by Itagaki. Applicants respectfully submit that Itagaki actually teaches away from the present invention by incorporating 20 - 80% hardened fat into the compositions, as the incorporation of such hardened fats results in, at most, compositions containing 80% cocoa butter.

The Examiner finds it would have been obvious to one of skill in the art to modify Duffett and use deodorized cocoa butter to make the powder form. However, Duffett only

discloses powder cocoa butter is used as part of the crumb making process or at the conching/tempering stage of chocolate production. Applicants respectfully submit one of skill in the art would not seek to eliminate cocoa butter flavor, i.e., a chocolate flavor, when manufacturing chocolate.

The Examiner also finds one of skill in the art would have been motivated to modify Duffett at least for the purpose of removing the undesirable cocoa butter flavor and making the fat based powdered product more versatile and usable in foods with other flavors as taught by Itagaki et al. However, the object of Itagaki is to provide a confectionary fat composition containing cocoa butter which are excellent in shape retention at ordinary temperature and whipping properties. It is submitted that the powder of Duffett would not have shape retention. Additionally, whipping a powder containing only cocoa butter is contrary to the teachings of Itagaki, which requires the presence of 20% to 80% hardened fat. Applicants respectfully submit the powdered cocoa butter of Duffett cannot be used as a filling for the foods as described in Itagaki et al.

Finally, the teachings of Itagaki and Duffett cannot be combined. "If proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification." *In re Gordon*, 733 F.2d 900 (Fed. Cir. 1984).

Itagaki discloses cocoa butter needs to be tempered, but fat compositions which are tempered can be hardly whipped because of the fat crystal content. Page 2, lines 11 – 19. Accordingly, Itagaki produces fat compositions without tempering to avoid the formation of crystals, i.e., by adding a hardened fat to cocoa butter. In contrast, Duffett discloses methods of producing crystals of fat. Page 1, lines 14 – 17. Applicants respectfully submit that the references cannot be combined, as Itagaki et al. seeks to avoid forming fat crystals, while Duffett produces fat crystals.

Claims 4 and 10 all depend from claim 1. As neither Duffett or Itagaki et al. teach or suggest all of the limitations of claim 1, it is submitted the rejection of claims 4 and 10 are improper.

3. Conclusion:

It is clear that the presently amended claims are not obvious over Duffett in view of Itagaki et al. Neither reference teaches or suggest all of the claim limitations, alone or in combination. Moreover, there is no motivation or reasonable expectation of success in practicing the claimed invention, as Itagaki teaches away from the present invention, and the teachings of Itagaki and Duffett cannot be combined. As the rejection under 35 USC § 103(a) is improper, Applicants respectfully request that it be withdrawn.

B. Claims 8 and 13 are rejected under 35 USC 103(a) as being unpatentable over Duffett (WO 98/13133) in view of Itagaki et al. (EP 0564787), and further in view of Kawabata et al. (US 5,460,847)

Applicants respectfully request the rejection be withdrawn, as claims 8 and 13 depend from claim 1. As previously discussed, Duffett and Itagaki et al. fail to teach or suggest all of the limitations of claim 1, and Kawabata fails to cure such defects.

#### V. Summary

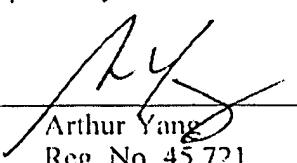
Applicants have made a *bona fide* attempt to address all matters raised by the Examiner. Applicants respectfully submit that the application is now in condition for allowance, and therefore respectfully request that the outstanding rejections be withdrawn and that a Notice of Allowance be issued. If any remaining matters need to be resolved, Applicants respectfully request an interview with the Examiner prior to any official action being taken by the Office in response to these arguments and amendments in order to facilitate allowance of the pending claims.

It is believed no fee is presently required. If a fee is required, please charge the same to Deposit Account 50-4255.

Respectfully submitted,

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